

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MARI DANIEL, individually and as the
Personal Representative of the Estate of
MELVIN DANIEL; and, as Guardian for the
minor children, M.A. Daniel, DOB 6/13/90,
and B.A. Daniel, DOB 6/28/93; and, MARI
DANIEL, as the Personal Representative of
the Estate of FRED RAMISKEY,

Plaintiffs,

v.

THE COLEMAN COMPANY, INC., a
Delaware corporation,,

Defendant.

No. 06-5706 KLS

ORDER DENYING MOTION FOR
SANCTIONS FOR PLAINTIFFS'
REPRESENTATIVES' EGREGIOUS
CONDUCT AS WELL AS ALL OTHER
MOTIONS CONTAINED IN THE
PLEADINGS

The matter presently before the court is Defendant, The Coleman Company, Inc's Motion for Sanctions for Plaintiff's Representatives' Egregious Conduct (Dkt. #94) as well as motions incorporated in the parties' pleadings which include a motion to strike the Declaration of Jeffery M. Campiche (Dkt. #108) filed by the Defendant and a Motion to Strike the over-length portions of the Defendant's Reply to Plaintiff's Response which is contained in the Plaintiffs' Surreply. (Dkt. #123). The for the reasons stated below, all motions are DENIED.

Based on the Court's understanding of the initial motion, the Defendant asserts that the cumulative

1 misconduct of Plaintiffs' counsel is so egregious that it requires this Court to impose sanctions. Plaintiffs'
2 counsel denies any such egregious conduct.

3 The undersigned has read and reviewed all of the documents filed in support of and in opposition to
4 this motion. It is the Court's understanding that the motion is based on five specific instances as well as
5 conduct that is the subject of separate pending motions.

6 **(1) Testing.** The first issue raised by the Defendant is the failure of Plaintiffs' counsel to provide
7 notice of testing which was being conducted in/on the subject camper. In support of this assertion, the
8 Court's attention is drawn to an ASTM guideline, a copy of which is attached as Exhibit A to the
9 Declaration of Scott R. Schillings. (Dkt. #96). The Court has reviewed Exhibit A and notes that the
10 guideline "recommends" notification to other parties "if it is determined that any test . . . is likely to alter
11 the nature, state or condition of the evidence so as to preclude or adversely limit similar . . . examination
12 and testing." No facts have been presented to this Court that support the invocation of this
13 "recommendation" as nothing has been presented to this Court to support the conclusion that the testing
14 that was conducted was destructive.

15 Further, the Court is not aware of any legal requirement of providing notice prior to tests being
16 conducted nor has anything been drawn to the Court's attention that suggests the Plaintiffs agreed to
17 provide notice to the Defendant of its experts conducting tests.

18 Finally, the Court notes that while the Defendant asserts the application of the ASTM guidelines,
19 the Court has not been provided with any citation to legal authority that makes the guideline a legally
20 binding and mandatory obligation of the Plaintiffs. The Court is certainly aware of the fact that
21 destructive testing may result in a motion being presented to the Court. That is clearly not the
22 circumstance in this case. The Defendant has failed to show any egregious conduct on the part of the
23 Plaintiffs' counsel.

24 **(2) Availability of the camper for testing.** On April 16, 2007 the Defendant filed a Motion to
25 Preserve Evidence. (Dkt. #17). The Defendants asked that this Court order the Plaintiffs to retain
26 ownership of the camper until the case was resolved. On May 17, 2007 the undersigned issued an Order
27 denying the Defendant's motion but also required the Plaintiffs to retain control of the camper for two
28 more months in order to allow the Defendant time to conduct any and all testing on the camper or its

1 component parts. (Dkt. #32). Now the Court has become aware of the fact that the Defendants did not do
2 any testing. Apparently the Defendant did nothing with regard to the trailer except take pictures sometime
3 in late August or early September - long after the time limit provided in my Order had expired.

4 In this motion, the Defendant alleges that in September 2007 it was intentionally mislead regarding
5 the status of the subject camper. They were told, and the Plaintiffs admit this, that the camper had been
6 sold. The Defendant was subsequently advised, on November 28, 2007, that the camper might still be
7 available for inspection as it had not been sold but had been moved to a consignment lot in Buckley,
8 Washington. The Court does not find this issue to be something other than an error. In light of the fact
9 that the Defendant did nothing with the camper when the Court ordered it be available, the Court is hard
10 pressed to find how the Defendant has been damaged in any fashion when it was first misinformed
11 regarding the status of the camper. The Defendant has failed to show any egregious conduct on the part of
12 Plaintiffs' counsel.

13 **3. Mr. Haney's deposition.** A careful reading of Mr. Haney's declaration (Exhibit H to
14 Declaration of Scott R. Schillings, Dkt. #96) does not support the Defendant's assertion that it is a "sham."
15 In Mr. Haney's deposition (Exhibit I to Declaration of Scott R. Schillings, Dkt. #96) Mr. Haney does
16 clearly testify that when the knob "reaches the detent, it pops out and it shuts it off." This testimony is also
17 supported by the DVD which was provided as Exhibit J to Scott R. Schillings Declaration.

18 Mr. Haney, in his most recent declaration at page 3, lines 9 - 10, testified that the heater "control
19 knob turned smoothly without clicks or stops or hesitations." This testimony does not contradict his
20 deposition testimony. It can be understood that his testimony relates to the movement of the knob when in
21 the "on" position covering the range from high to low. There is no clear contradiction. The Defendant has
22 failed to show any egregious conduct on the part of Plaintiffs' counsel or Mr. Haney.

23 **4. Deposition of Mr. Engberg.** The Court notes that the Defendant filed its motion defense
24 counsel stated that he was "concerned that Mr. Stageberg will not produce Mr. Engberg for testimony, as
25 ordered by the Court." Mr. Engberg was produced and his deposition was taken. The Defendant has
26 failed to show any egregious conduct on the part of Plaintiffs' counsel.

27 **5. Miscellaneous argument.** The undersigned notes that in its "Factual Background" section of
28 its Motion that the Defendant raised issues regarding (a) an "expert" report by Eileen M. Kirkpatrick and

1 noted that a separate motion had been filed in regard to her report; (b) untimely rebuttal reports by two of
2 Plaintiffs' experts, Gary Hutter and Tarald Kvalseth; and (c) Plaintiffs' late assertion of a new, alternate
3 case theory. These issues were not, however, addressed under the "Arguments and Authorities" section of
4 the Defendant's Motion. This Court further notes that it has already excluded Eileen M. Kirkpatrick's
5 testimony and use of her information as evidence at trial. The other two issues appear to be included in
6 motions pending before this Court. While the Court did grant the Defendant's motion with regard to Ms.
7 Kirkpatrick, the other two issues are still pending and cannot provide the basis for any finding of egregious
8 conduct on the part of the Plaintiffs.

9 In light of the Court's ruling, the parties additional motions to strike are DENIED.

10 Finally, for the reasons stated above, the Defendant's Motion for Sanctions for Plaintiff's
11 Representatives' Egregious Conduct is hereby DENIED. (Dkt. #94).

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13 DATED this 17th day of January, 2008.

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16 Karen L. Strombom
17 United States Magistrate Judge
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